Supreme Court, U.S.
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No. 01-1809

In the Supreme Court of the United States

C. DAVID MORRISON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a taxpayer's motivation for failing to pay taxes is relevant to the offense of willfully failing to account for and pay over taxes, in violation of 26 U.S.C. 7202.

2. Whether the district court abused its discretion in declining to accept petitioner's conditional plea of guilty.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-6) is unpublished, but is available at 32 Fed. Appx. 669.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 2002. A petition for rehearing was denied on March 12, 2002 (Pet. App. 18). The petition for a writ of certiorari was filed on June 10, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the Southern District of West Virginia, petitioner was convicted on every count in a twenty-three count indictment, including two

counts of willfully failing to collect or truthfully account for and pay over employment taxes, in violation of 26 U.S.C. 7202. Pet. App. 2; Gov't C.A. Br. 2. He was sentenced to 97 months imprisonment, fined $15,000, and ordered to pay restitution of $692,318. Gov't C.A. Br. 3. The court of appeals affirmed. Pet. App. 1-6.

1. Petitioner was the Chief Executive Officer of Logan Medical Foundation, d/b/a Logan General Hospital. In that capacity, petitioner was responsible for determining which financial obligations of the hospital would be paid. The hospital, as an employer, was required to withhold federal taxes from its employees' wages. In the third quarter of 1997, the hospital failed to pay $3,316,864.18 in withheld employment taxes, and in the fourth quarter of 1997, the hospital failed to pay $1,226,352.96 in withheld taxes. A representative of the Internal Revenue Service informed petitioner that the hospital was required to pay the taxes. The taxes, however, remained unpaid when the hospital filed for bankruptcy protection in October 1998. Gov't C.A. Br. 3-4, 6-11.

2. Petitioner was charged, *inter alia*, with two counts of willfully failing to account for and pay over employment taxes. Petitioner did not dispute that the taxes were owed and not paid, but he sought to argue that his desire to maintain the hospital's operations by paying competing financial obligations presented a good motive for failing to pay over the withheld taxes. Before trial, the government filed a motion to exclude evidence of such a motive. The district court granted the government's motion, ruling that willfulness under 26 U.S.C. 7202 means the "voluntary, intentional violation of a known legal duty," and that the presence or absence of a bad motive is irrelevant. Pet. App. 2-3, 8-9.

Petitioner then attempted to enter a conditional guilty plea to the two tax counts, reserving the right to challenge the district court's ruling preventing the introduction of evidence concerning petitioner's motive. At the hearing on the proposed plea, the district court asked petitioner whether he was aware of his legal duty to pay the taxes and whether he had intentionally violated that duty. Petitioner answered in the affirmative. The district court then asked petitioner whether he acted with the specific intent to violate the law. Petitioner answered, "No, sir." When the district court indicated its unwillingness to accept the plea, the government explained its understanding that a specific intent to violate the law is equivalent to a voluntary and intentional violation of a known legal duty. The district court ruled, however, that "there must be some different understanding on the part of the defendant." Pet. App. 3-4, 12-15.

Petitioner's counsel did not ask the district court to clarify its definition of specific intent and did not attempt to address the court's concerns about petitioner's understanding of "specific intent." Counsel instead discussed petitioner's alleged good motive for violating the law, prompting the district court to reiterate its earlier ruling finding that evidence irrelevant. The district court refused to accept petitioner's guilty plea because the court was not satisfied that petitioner completely acknowledged his guilt. At trial, a jury found petitioner guilty on all counts. Pet. App. 2, 4, 15-17.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. 1-6. The court first held that the district court's definition of willfulness was "squarely in line with the definition of willfulness [this] Court has declared applicable in the context of the criminal tax

statutes." *Id.* at 4 (citing *Cheek* v. *United States*, 498 U.S. 192, 201 (1991)). The court rejected petitioner's contention that "bad motive" is an element of willfulness. *Id.* at 5. The court explained that, although this Court's decision in *United States* v. *Bishop*, 412 U.S. 346, 360 (1973), referred to an evil motive, the Court subsequently made clear in *Cheek*, 498 U.S. at 201, that the motive referred to in *Bishop* was the intentional violation of a known legal duty. *Bishop* thus had not altered the Court's definition of "willfullness" as the voluntary, intentional violation of a known legal duty. Pet. App. 5.

The court of appeals also held (Pet. App. 6) that the district court had not abused its discretion in rejecting petitioner's conditional guilty plea. After noting that, under Federal Rule of Criminal Procedure 11(f), a district court must ensure that there is a factual basis for a guilty plea, the court of appeals observed that there is "no absolute right to have a guilty plea accepted" and that a district court may "reject a plea in [the] exercise of sound judicial discretion." Pet. App. 5-6 (quoting *Santobello* v. *New York*, 404 U.S. 257, 262 (1971)). The court explained that, here, to the extent that "there was any ambiguity or misunderstanding * * * about the [district] court's use of the term 'specific intent,'" it was petitioner's responsibility "to clear that up with the court and to satisfy the court that the defendant was voluntarily entering a knowing and intelligent guilty plea." Pet. App. 6. The court of appeals added that, although petitioner was given the opportunity to make a statement on the issue, he failed to take the opportunity. On that record, the court concluded, it could not find that the district court had abused its discretion.

ARGUMENT

1. Petitioner asserts (Pet. 8-14) that the courts of appeals are divided on whether a taxpayer's ability to pay is relevant to the element of "willfullness" under 26 U.S.C. 7202. That contention is without merit.

This Court has defined "willfulness" in the context of the criminal tax statutes as a "voluntary, intentional violation of a known legal duty." *Cheek* v. *United States*, 498 U.S. 192, 201 (1991) (quoting *United States* v. *Pomponio*, 429 U.S. 10, 12 (1976) (per curiam)); *United States v. Bishop*, 412 U.S. 346, 360 (1973). The element of willfulness, the Court has made clear, does not require a showing of bad purpose. *Cheek*, 498 U.S. at 200-201; *Pomponio*, 429 U.S. at 12. The Court explained in *Pomponio* that, although previous opinions had contained references to an "evil motive" or a lack of justification, "willful" under the federal tax statutes means a voluntary, intentional violation of a known legal duty, and there is no requirement of "any motive other than an intentional violation of a known legal duty." *Ibid.*; see *Cheek*, 498 U.S. at 201. Petitioner thus acted with the requisite "willfulness" when he voluntarily and intentionally failed to pay over withheld employment taxes despite knowledge of his legal obligation to do so.

In asserting that the courts of appeals are in conflict on the definition of willfulness, petitioner relies principally (Pet. 9) on *United States* v. *Poll*, 521 F.2d 329 (9th Cir. 1975). In *Poll*, the Ninth Circuit stated that,

> to establish willfulness the Government must establish * * * that at the time payment was due the taxpayer possessed sufficient funds to enable him to meet his obligation or that the lack of sufficient funds on such date was created by (or was the result

> of) a voluntary and intentional act without justification in view of all the financial circumstances of the taxpayer.

Id. at 333. That statement no longer represents the governing approach in the Ninth Circuit.

The Ninth Circuit decided *Poll* before this Court had made clear, in *Pomponio*, that the reference in previous decisions to an "evil motive" was not intended to suggest that willfulness "requires proof of any motive other than an intentional violation of a known legal duty." 429 U.S. at 12.[1] The Ninth Circuit has since come into line with this Court's decisions on this issue, holding that "[w]illfulness in the context of criminal tax cases is defined as a voluntary, intentional violation of a known legal duty" and "need not include bad faith or bad purpose." *United States* v. *Gilbert*, 266 F.3d 1180, 1185 (9th Cir. 2001) (quoting *United States* v. *Powell*, 955 F.2d 1206, 1210 (9th Cir. 1992)). In fact, the Ninth Circuit has rejected the argument advanced by petitioner here—*i.e.*, that a failure to pay taxes is excused or justified when a defendant, with knowledge that his actions are unlawful, voluntarily and intentionally uses available funds to pay other financial obligations. See *id.* at 1185.

The remaining decisions relied on by petitioner also do not establish a circuit conflict. See Pet. 9-10 (citing *United States* v. *Pinner*, 561 F.2d 1203, 1206 (5th Cir.

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[1] Petitioner asserts (Pet. 9 n.3) that this Court denied certiorari in *Poll* after it issued its decision in *Pomponio*. That is incorrect. The government did not file a petition for certiorari in *Poll* after the Ninth Circuit reversed Poll's conviction for willfully failing to account for and pay over taxes. The denial of certiorari cited by petitioner relates to Poll's subsequent retrial and conviction on a different charge.

1977), *United States* v. *Martin*, 507 F.2d 428, 430 (7th Cir. 1974), and *United States* v. *Rosenfield*, 469 F.2d 598, 601 (3d Cir. 1972), cert. denied, 411 U.S. 932 (1973)). Those decisions hold that there is no "willful" failure to file a tax return when the defendant's failure to file a return is based on an erroneous belief that the obligation extends only to individuals able to pay the tax. Here, however, petitioner knew about his legal duty to account for and pay over withheld employment taxes but voluntarily and knowingly decided not do so. Although, as petitioner observes (Pet. 13), *United States* v. *McGill*, 964 F.2d 222 (3d Cir.), cert. denied, 506 U.S. 1023 (1992), noted a "split of authority" on whether a taxpayer's ability to pay is relevant to the element of "willfulness," *id.* at 238-239 n.30, the only court of appeals decisions cited by *McGill* as evidencing a split are *Poll* and an earlier Ninth Circuit opinion, *United States* v. *Andros*, 484 F.2d 531, 533 (1973), which no longer state the governing standard in that court.[2]

Finally, petitioner errs in relying (Pet. 10-12) on the Child Support Recovery Act of 1992 (CSRA), 18 U.S.C. 228, which prescribes criminal penalties for willfully

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[2] Petitioner's reliance (Pet. 10) on *United States* v. *Harper*, 397 F. Supp. 983, 990 (E.D. Pa. 1975), and *United States* v. *Goodman*, 190 F. Supp. 847, 854-856 (N.D. Ill. 1961), is misplaced. In *Harper*, the district court concluded that the taxpayer could invoke his Fifth Amendment privilege against self-incrimination and refuse to provide information about his assets and income because evidence of his ability to pay taxes would indicate that his failure to pay was willful. In *Goodman*, the district court held that the government was required to prove that the defendant was financially able to pay his taxes, but that opinion predated this Court's decision in *Pomponio* and has been rejected by the courts of appeals. See *e.g.*, *United States* v. *Ausmus*, 774 F.2d 722, 725 (6th Cir. 1985); *United States* v. *Tucker*, 686 F.2d 230, 233 (5th Cir.), cert. denied, 459 U.S. 1071 (1982).

failing to pay child support. Even assuming that the definition of willfulness in the CSRA and in the criminal tax statutes is different, there is no conflict on the meaning of "willfulness" in the latter context.[3]

2. Petitioner also argues (Pet. 14) that the district court abused its discretion in refusing to accept his conditional guilty plea. That fact-bound contention lacks merit.

At the hearing on the proposed plea, petitioner admitted that he knew of his legal duty to pay the taxes and that he intentionally violated that duty. Pet. App. 3. But petitioner denied that he acted with the specific intent to violate the law. *Ibid.* Petitioner apparently responded in that manner based on a belief that an admission that he had a specific intent to violate the law was incompatible with the argument he wanted to preserve for appeal—that his motive of preserving the hospital's operations excused his failure to pay over the taxes.

Petitioner's denial that he acted with specific intent to violate the law contradicted his admission that he had intentionally violated a known legal duty. See *Cheek*, 498 U.S. at 200-201 (observing that "specific intent to violate the law [is] an element of certain federal criminal tax offenses" and holding that "the standard for the statutory willfulness requirement is the 'voluntary, intentional violation of a known legal

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[3] There is no merit to petitioner's argument (Pet. 12) that the governing standard for willfulness under the criminal tax statutes is "inconsistent with a fair system of taxation." Withheld employment taxes are held in trust for the United States. *Slodov* v. *United States*, 436 U.S. 238, 243 (1978). The federal tax statutes criminally prohibit the intentional use of those funds for alternate purposes in violation of a known legal duty to make payment to the United States.

duty'"). In addition, a good-faith belief that one's actions do not violate the tax laws negates the statutory element of willfulness. See *id.* at 202. As a result, when petitioner denied that he specifically intended to violate the law, he effectively denied an element of the offense. For those reasons, the district court acted within its discretion in refusing accept his conditional guilty plea.

Contrary to petitioner's assertion (Pet. 17), the court of appeals' decision does not conflict with the decision of the D.C. Circuit in *United States* v. *Washington*, 969 F.2d 1073, 1077 (1992), cert. denied, 507 U.S. 922 (1993). In *Washington*, the court of appeals held that the district court abused its discretion in rejecting the defendant's guilty plea based on his refusal to admit facts (the culpability of an accomplice) that were external to the elements of the charged offense. Here, the questions asked by the district court did not involve matters external to the elements of the offense. Instead, as explained, a "specific intent" to violate the law is equivalent to "willfulness" in this context, and petitioner's response called into question his admission to the elements of the offense.[4]

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[4] Petitioner errs in suggesting (Pet. 16) that his statements in the plea hearing could have been used against him in a retrial. If the district court had accepted petitioner's guilty plea and if he had been able to overturn his conviction on appeal, he would have been allowed to withdraw the plea. See Fed. R. Crim. P. 11(a)(2). In that event, his statements in the plea hearing generally could not have been used against him in a retrial. See Fed. R. Crim. P. 11(e)(6)(C)-(D).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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